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THE POWER OF STATE LEGISLATURES TO SUBPOENA FEDERAL OFFICIALS

MICHAEL VITIELLO*

I. INTRODUCTION

Within the federal system, state legislatures and state courts retain broad powers respectively to legislate and to adjudicate.¹ A congressional enactment may preempt a particular subject matter for legislation,² or Congress may create exclusive federal court jurisdiction.³ Absent congressional intent to withdraw a subject matter from the state system, state legislatures and courts share concurrent authority with Congress and the federal courts. In those areas, at least in theory, federal and state authorities are considered fungible.⁴ For example, in *Stone v. Powell*⁵ the Court based its refusal to extend the exclusionary rule to federal habeas corpus proceedings in part on an assumption that state courts were "functionally interchangeable forums

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1. U.S. CONST. amend. X.

2. See generally J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 267-70 (1978).

3. See, e.g., 28 U.S.C. § 1338(a) (1976) (exclusive jurisdiction over patents, copyrights, and trade-marks); see also *Clafin v. Houseman*, 93 U.S. 130 (1876); *Miller v. Grandos*, 529 F.2d 393 (5th Cir. 1976).

4. See M. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* (1980):

As noted previously, under traditionally accepted notions of federalism, state and federal courts have been considered largely fungible. Except in the comparatively rare instance where Congress has explicitly or by implication provided that jurisdiction is exclusively federal, state courts historically stand equal with their federal counterparts as enforcers of federal rights.

If state and federal courts are, in fact, interchangeable, there should be no question that whenever a federal court may regulate or control the actions of federal officers because their actions have transgressed statutory or constitutional limits, absent direct congressional prohibition state courts should have similar power. Those who believe in the current vitality of the traditional view generally reach this conclusion.

Id. at 116 (footnotes omitted).

5. 428 U.S. 465 (1976).

likely to provide equivalent protection for federal constitutional rights."⁶

Because of broad concurrent powers, state legislatures may frequently be aided by acquisition of information possessed by federal officials. The need for such information will become acute if President Reagan's "New Federalism" accomplishes its goal of shifting to the states programs currently administered by the federal government.⁷ The federal government can voluntarily relinquish such information,⁸ and state officials may be able to use federal courts to procure some information.⁹ The question discussed in this article is whether a state legislature may compel attendance of federal officials by use of its subpoena power.

The United States Supreme Court has never decided this question. There is only one federal district court decision on point. The district court in *United States v. Owlett*¹⁰ found that "complete immunity of a federal agency from state interference is well established" and that the Pennsylvania Legislature could not, therefore, subpoena federal officials.¹¹ The related question of state courts' power over federal officials has been the subject of more frequent adjudication.¹²

After consideration of the general investigative powers of legislative bodies and the limitation posed by the *Owlett* decision, this article will examine the cases involving state court, as opposed to state legislative, power over federal officials to determine the extent to which those decisions prohibit a legislature from compelling federal officials to appear and to testify before it. It is the conclusion of this writer that the rationale for disallowing state courts to summon federal officials does not apply with equal force to state legislatures—that is, that there is no justification for a complete prohibition against a state legisla-

6. Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1105 (1977).

7. See, e.g., Issacson, *An Unhappy Anniversary: Amid Economic Woes, the President Calls for a New Federalism*, TIME, Feb. 1, 1982, at 12-14.

8. See, e.g., *Ponzi v. Fessenden*, 258 U.S. 254, 261-62 (1922). The holding in *Ponzi* has been codified at 18 U.S.C. § 4085 (1982).

9. See, e.g., Freedom of Information Act, 5 U.S.C. § 552(a)(4)(B) (1982) (authorizing a federal district court to order the production of agency records improperly withheld from a complainant).

10. 15 F. Supp. 736 (M.D. Pa. 1936).

11. *Id.* at 741.

12. See *infra* notes 35-110 and accompanying text.

ture's summoning of federal officials. It is the recommendation of this writer that Congress enact a statute clarifying a state's right to subpoena federal officials if the subject matter is otherwise within the legislature's competence. An alternative, though less certain, course would be for a state legislature to establish the same authority through litigation, up to the Supreme Court if necessary.

II. THE LEGISLATIVE POWER TO INVESTIGATE

The power to investigate is necessary for a legislature to perform its function. Legislative investigation was well established in England and the United States prior to the adoption of the Constitution.¹³ Contempt and subpoena powers to coerce unwilling witnesses are necessary corollaries to that power.¹⁴

In theory, the power to investigate is limited. The legislature can compel production of evidence only if it relates to a proper legislative function.¹⁵ Further, a legislature must observe the constitutional rights guaranteed by the first amendment of the United States Constitution.¹⁶

In *McGrain v. Dougherty*,¹⁷ a leading case on the limits of congressional investigations, the Court in dicta addressed the power of state legislatures. The Court cited with approval state court decisions upholding a legislature's implied authority "to obtain information needed in the rightful exercise of [the] power [to legislate]."¹⁸

Federal courts of appeal have also held that state legisla-

13. For a discussion of the history of legislative powers to investigate, see *McGrain v. Dougherty*, 273 U.S. 135, 161-74 (1927); Keele, *Note on Congressional Investigations*, 40 A.B.A. J. 154 (1954), reprinted in *LEGISLATION: CASES AND MATERIALS* 73-74 (C. Nutting & R. Dickerson eds. 1978).

14. See, e.g., 2 U.S.C. § 192 (1982) (making contempt of Congress a misdemeanor).

15. See T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 253-54 (1970), reprinted in *LEGISLATIVE LAW AND PROCESS: CASES AND MATERIALS* 608 (O. Hetzel ed. 1980). The legislature can force production of oral or documentary evidence only when the evidence relates to a proper function of the legislature, including the "primary one of enacting laws" and "such ancillary powers as judging the election of its members, expelling or disciplining members, impeaching government officials, approving appointments, . . . and . . . punishing those who would attempt to bribe its members." *Id.* at 253.

16. *Id.* at 254. See, e.g., *Barenblatt v. United States*, 360 U.S. 109, 126 (1959); *Watkins v. United States*, 354 U.S. 178, 197-98 (1957).

17. 273 U.S. 135 (1927).

18. *Id.* at 165.

tures can inquire into areas in which they have power to legislate so long as individual rights are not violated. The United States Court of Appeals for the Fourth Circuit, for example, cautioned that "no federal court should enjoin a state legislative committee so long as it is acting within the scope of the authority granted it by the legislature and its actions are not interdicted by the Constitution of the United States."¹⁹ According to one commentator, "[t]he State legislatures are not confined by anything except the possibility of conflict with Federal power."²⁰ That is, whether a state legislature ought to be able to subpoena a federal official should be examined in light of the general rule that legislative power over witnesses and subject matter is broad. Public policy requires that power be broad because of the need for informed legislative decisions.

III. STATE LEGISLATIVE POWER OVER FEDERAL OFFICIALS

A question separate from recognized constitutional protections afforded to all individuals testifying before investigatory committees is whether federal officials are entitled to invoke a complete immunity from testifying before such bodies. The Supreme Court has never decided this question, and the only lower court case on point is *United States v. Owlett*.²¹

In *Owlett*, the government sought an injunction to prevent a Pennsylvania legislative committee from investigating the Works Progress Administration (WPA) in that state. The committee subpoenaed WPA officials, but the district administrator issued a directive that "no officer or employee of the Works Progress Administration shall furnish any information or make available any official document or copy thereof to any person, except persons having official business with the Works Progress Administration."²²

The district court granted the injunction because it found that investigation of federal agencies by state legislative commissions "is an interference with the proper governmental function

19. *Jordan v. Hutcheson*, 323 F.2d 597, 605-06 (4th Cir. 1963), *disapproved on other grounds*, Supreme Court of Virginia v. Consumers Union of United States, 446 U.S. 719, 732 n.10 (1980).

20. T. EMERSON, *supra* note 15, at 254.

21. 15 F. Supp. 736 (M.D. Pa. 1936).

22. *Id.* at 740.

of the United States of America, [and that] complete immunity of a federal agency from state interference is well established."²³ The attempt to investigate, concluded the court, amounted to "an invasion of the sovereign powers of the United States of America."²⁴ In addition to theoretical concerns about sovereignty, the court was concerned about the pragmatic impact that state investigations might have on the operation level of the federal government: "The state having the power to subpoena may abuse that power by constantly and for long periods requiring federal employees and necessary federal records to be before an investigating committee. This power could embarrass, impede, and obstruct the administration of a federal agency."²⁵ Further, the court reasoned from the Supreme Court's decision in *McGrain v. Dougherty*²⁶ that the Pennsylvania Legislature exceeded its power when it set up a committee to investigate an area in which the legislature was powerless to act: "[T]he subject-matter of the investigation . . . is a matter over which the [state] has no legislative power, and the information sought cannot enable it to legislate on the subject of the investigation"²⁷

Although not faced with the precise question raised in *Owl-ett*, the Fifth Circuit relied on that decision in *United States v. McLeod*.²⁸ *McLeod* arose out of attempts by Dallas County, Alabama officials to prevent the registration of black voters during the early 1960's. The United States sought to enjoin a state grand jury from investigating the Civil Rights Division of the Justice Department. The government alleged *inter alia* that the

23. *Id.* at 741. In support of its view, the court cited *Boske v. Comingore*, 177 U.S. 459 (1900) (denying a state court power to subpoena records), *Van Brocklin v. Tennessee*, 117 U.S. 151 (1886) (denying a state court power to tax property of the United States within the state), *Tennessee v. Davis*, 100 U.S. 257 (1879) (denying a state court power to criminally prosecute federal officials upon removal to federal court), and *Buchanan v. Alexander*, 45 U.S. (4 How.) 20 (1846) (denying a state court power to attach unpaid wages of federal employees).

24. 15 F. Supp. at 742.

25. *Id.*

26. 273 U.S. 135 (1927).

27. 15 F. Supp. at 742. The court granted the requested injunction against the committee despite the availability of habeas corpus because a "court of equity will not subject the United States of America to a multiplicity of suits or compel federal officers and employees to incur the risk of fine and imprisonment to protect the United States of America from an illegal invasion of its sovereignty." *Id.* at 743.

28. 385 F.2d 734 (5th Cir. 1967).

intent of the county officials was to hamper the operation of the Civil Rights Division.²⁹ The Fifth Circuit reversed the district court's denial of the injunction.³⁰ The court relied on *Owlett*: "The interference of a state grand jury is just as intolerable as that of a state legislative committee."³¹ The court did, however, consider the defendant's contention that the investigation dealt with violations of state law, but rejected the claim as a "patent sham."³² Thus, the Fifth Circuit did not have to decide the more difficult question of whether a state legislative body could subpoena federal officials on matters within this limit of state authority. The state contended that the federal attorneys should appear and assert a privilege against answering specific questions. But the court apparently rejected that view, in dictum, in favor of complete immunity found in *Owlett*: "[M]erely calling employees of the federal government before the grand jury would have the proscribed disruptive effect on the administration of a federal agency."³³

As indicated, there is little case law defining the power of a state legislature to subpoena federal officials to testify or to produce documents. *Owlett* and the cases that have relied on it³⁴ are based on three premises. First, while the state and federal governments are dual sovereigns, federal law is supreme in certain areas. It would, therefore, be antithetical to recognize the power of the state legislature to compel federal officials to attend legislative inquiries. Second, the operation of the federal government can be obstructed if state legislatures are allowed to call federal officials away from their jobs, demand control of federal records, or incarcerate federal officials who fail to comply with legislative commands. Third, state legislative committees investigating federal agencies are acting without jurisdiction because the inquiry does not relate to a proper legislative function.

Courts have relied on similar reasoning in cases involving the more frequently litigated issue of whether a state court may

29. *Id.* at 738-39.

30. *Id.* at 752.

31. *Id.*

32. *Id.* at 751.

33. *Id.* at 752.

34. See, e.g., *id.* at 751-52; *Pennsylvania Turnpike Comm'n v. McGinnes*, 179 F. Supp. 578, 582 (E.D. Pa. 1959), *aff'd*, 278 F.2d 330 (3d Cir.), *cert. denied*, 364 U.S. 820 (1960).

coerce compliance of federal officials. Therefore, after a review of the case law in that context, it may be useful to examine the continued soundness of that reasoning.

IV. STATE COURT POWER OVER FEDERAL OFFICIALS

The power of state courts over federal officials has been litigated frequently. The Supreme Court has not established a complete immunity for federal officials; instead, an official's capacity to be sued depends on the relief sought by the plaintiff. Thus, federal courts have held that state courts may issue neither the writ of habeas corpus directing the release of a federal prisoner³⁵ nor the writ of mandamus to force a federal official to act.³⁶ Conversely, federal courts have allowed state courts to hear cases requesting damages against federal officials for acts done pursuant to their official authority.³⁷ A litigant may also proceed in state court against a federal official in a case involving replevin³⁸ or ejectment.³⁹ Less certain is whether a state court may enjoin a federal official. Without Supreme Court authority, lower courts have divided on that question.⁴⁰

A. Habeas Corpus

Prior to passage of the fugitive slave law in 1850,⁴¹ it was generally assumed that state courts had the power to order the release of a federal detainee.⁴² Slave owners pushed for the passage of the 1850 law to expedite the return of runaway slaves by

35. *Tarbles Case*, 80 U.S. (13 Wall.) 397 (1871); *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1859).

36. *McClung v. Silliman*, 19 U.S. (6 Wheat.) 598 (1821).

37. *Teal v. Felton*, 53 U.S. (12 How.) 284 (1852).

38. *Slocum v. Mayberry*, 15 U.S. (2 Wheat.) 1 (1817).

39. *Stanley v. Schwalby*, 147 U.S. 508 (1893).

40. See, e.g., *Kennedy v. Bruce*, 298 F.2d 860 (5th Cir. 1962); *Alabama ex rel. Gallion v. Rogers*, 187 F. Supp. 848 (M.D. Ala. 1960), *aff'd per curiam sub nom. Dinkens v. Attorney General*, 285 F.2d 430 (5th Cir.), *cert. denied*, 366 U.S. 913 (1961); *Alabama v. Jones*, 189 F. Supp. 61 (M.D. Ala. 1960); *Pennsylvania Turnpike Comm'n v. McGinnes*, 179 F. Supp. 578 (E.D. Pa. 1959), *aff'd per curiam*, 278 F.2d 330 (3d Cir.), *cert. denied*, 364 U.S. 820 (1960); *Parry v. Delaney*, 310 Mass. 107, 37 N.E.2d 249 (1941). *But see* *Lewis Pub. Co. v. Wyman*, 152 F. 200, 205 (C.C.E.D. Mo. 1907).

41. Act of Sept. 18, 1850, ch. 60, § 9 Stat. 462 (repealed 1864).

42. See, e.g., *Commonwealth v. Downes*, 41 Mass. (24 Pick.) 227 (1836); *Commonwealth v. Cushing*, 11 Mass. 66 (1814); *State v. Dimick*, 12 N.H. 194 (1841); *United States v. Wyngall*, 5 Hill 16 (N.Y. Sup. Ct. 1843); *In re Carlton*, 7 Cow. 471 (N.Y. Sup. Ct. 1827); *In re Stacy*, 10 Johns. 328 (N.Y. Sup. Ct. 1813); *In re Pleasants*, 11 Am. Ju. 257 (Va. 1834).

increasing the number of federal officials empowered to issue a certificate of ownership and by making available federal marshals to assist transportation of slaves back to the South.⁴³

State court judges thwarted the act by issuing the writ of habeas corpus for the release of slaves within their jurisdiction.⁴⁴ In turn, federal marshals acting in deference to federal law were incarcerated for refusing to obey state court orders. They then sought release by seeking the writ of habeas corpus in federal court.⁴⁵

In 1859, the Supreme Court first addressed the power of state judges to issue the writ of habeas corpus in such cases in *Ableman v. Booth*.⁴⁶ *Ableman* involved a federal prisoner convicted for aiding in the escape of a slave. A Wisconsin Supreme Court judge ordered the prisoner's release from federal custody.⁴⁷ The United States Supreme Court held that the state court was without jurisdiction:

[A]lthough the State of Wisconsin is sovereign within its territorial limits to a certain extent, yet that sovereignty is limited and restricted by the Constitution of the United States. And the powers of the General Government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting sepa-

43. The Act of 1850 expanded a 1793 statute that gave slave owners the right to obtain a certificate of ownership of an escaped slave from a federal judge or state magistrate. Act of Feb. 12, 1793, ch. 7, 1 Stat. 302 (repealed 1864). The owner was then authorized to take the slave home. Since state magistrates rarely issued the certificates and the federal court system had few judges, the 1850 Act provided that commissioners of the federal circuit courts could issue the certificates and that federal marshals would be available to assist slave owners in the journey back to the South.

44. See, e.g., *In re Barrett*, 42 Barb. 479 (N.Y. App. Div. 1863); *In re Hopson*, 40 Barb. 34 (N.Y. App. Div. 1863); *Reilly's Case*, 2 Abb. Pr. (n.s.) 334 (N.Y. 1867); *In re Dobbs*, 21 How. Pr. 68 (N.Y. 1861); *Phelan's Case*, 9 Abb. Pr. 286 (N.Y. 1859). See R. HURD, A TREATISE ON THE RIGHT OF PERSONAL LIBERTY AND ON THE WRIT OF HABEAS CORPUS 556-57 (2d ed. 1972); see also *id.* § V (describing state courts' exercise of jurisdiction over habeas corpus cases to free federal detainees).

45. The federal courts most often held that "when in a state habeas proceeding it became known that the relator was in federal custody, the state court's jurisdiction ceases, and all further proceedings in the case will be *coram non judice*." *Ex parte Siford*, 22 F. Cas. 105, 108 (S.D. Ohio 1857). *Accord Ex parte Robinson*, 20 F. Cas. 965, 968 (C.C.S.D. Ohio 1856); *Ex parte Robinson*, 20 F. Cas. 969, 972 (C.C.S.D. Ohio 1855); *Charge to Grand Jury-Fugitive Slave Law*, 30 F. Cas. 1007, 1010 (C.C.S.D.N.Y. 1851); *Norris v. Newton*, 18 F. Cas. 322, 325 (C.C.D. Ind. 1850).

46. 62 U.S. (21 How.) 506 (1859).

47. *In re Booth*, 3 Wis. 13, 17-18 (1854).

rately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a State judge or State court, as if the line of division was traced by landmarks and monuments visible to the eye. And the State of Wisconsin had no more power to authorize these proceedings of its judges and courts, than it would have had if the prisoner had been confined in Michigan, or in any other State of the Union, for an offence against the laws of the State in which he was imprisoned.⁴⁸

Further, the Court relied on a pragmatic concern that "a Government . . . could [not] have lasted a single year . . . if offenses against its laws could not have been punished without the consent of the State."⁴⁹

The Court again considered the issue in *Tarble's Case*.⁵⁰ State courts had read *Ableman* narrowly as applying only to federal detainees incarcerated through judicial process.⁵¹ *Tarble* involved an enlistee in the army, ordered released by a state court judge. The Supreme Court again found federal authority supreme, and relied on the potential for disruption of the federal government.⁵² Further, the Court found federal habeas corpus proceedings adequate protection against illegal detention.⁵³ Most important, in apparent reliance on the supremacy clause, the Court grounded its decision on the sovereignty argument: "Whenever, therefore, any conflict arises between the enactments of two sovereignties, or in the enforcement of their asserted authorities, those of the National government must have

48. 62 U.S. (21 How.) at 516.

49. *Id.* at 515.

50. 80 U.S. (13 Wall.) 397 (1871).

51. See, e.g., *Ex parte Anderson*, 16 Iowa 595, 598 (1864); *Ex parte McCarey*, 2 Am. L. Rev. 347 (Me. 1867); *In re Shirk*, 5 Phila. 333 (Pa. 1863). *Contra In re Spangler*, 11 Mich. 298 (1863); *State v. Zulich*, 29 N.J.L. 409 (1862); *In re Hopson*, 40 Barb. 34 (N.Y. 1863); *In re Dobbs*, 21 How. Pr. 68 (N.Y. 1861); *In re Disinger*, 12 Ohio St. 256 (1861).

52. "It is evident, as said by this court when the case of Booth was finally brought before it, if the power asserted by that State court existed, no offense against the laws of the United States could be punished by their own tribunals, without the permission and according to the judgment of the courts of the State in which the parties happen to be imprisoned . . ." *Tarble*, 80 U.S. at 403. "It is manifest that the powers of the National government could not be exercised with energy and efficiency at all times, if its acts could be interfered with and controlled for any period by officers or tribunals of another sovereignty." *Id.* at 409.

53. *Id.* at 411.

supremacy until the validity of the different enactments and authorities can be finally determined by the tribunals of the United States."⁵⁴ Laid to rest was a narrow interpretation of *Ableman*: federal custody, not undisputed authority established by a judicial proceeding, deprives the state court of jurisdiction; the lawfulness of the detention is determined by the federal courts.⁵⁵

Despite scholarly criticism, *Tarble* has been widely followed, leading one commentator to remark that "it has been conclusively determined that the state courts possess no power . . . to remove any person from the jurisdiction of the federal officials or courts, through the writ of *habeas corpus*."⁵⁶ In subsequent decisions, the Supreme Court has not repudiated *Tarble* and *Ableman*.⁵⁷

Tarble has been subjected to criticism on various grounds.⁵⁸ First, *Tarble's* insistence that the validity of "enactments . . . of the National government . . . [must initially be] determined by the tribunals of the United States"⁵⁹ flies in the face of the rule well established even prior to *Tarble* that state courts are empowered to enforce federal law concurrently with federal courts so long as Congress did not vest exclusive jurisdiction in the federal courts.⁶⁰ State court jurisdiction over cases involving federal questions was imperative prior to 1875, when Congress placed general federal question jurisdiction in federal courts.⁶¹ Further,

54. *Id.* at 407. This view of federalism has come under serious criticism. See, e.g., Arnold, *The Power of State Courts to Enjoin Federal Officers*, 73 YALE L.J. 1385 (1964).

55. *Tarble*, 80 U.S. at 410.

56. Warren, *Federal and State Court Interference*, 43 HARV. L. REV. 345, 358 (1930). It appears that *Tarble* and *Ableman* are still controlling precedent in federal court. See, e.g., *Huff v. United States*, 437 F. Supp. 564, 568 (W.D. Mo. 1977); *Thomas v. Levi*, 422 F. Supp. 1027, 1033 (E.D. Pa. 1976). Cf. *Quillar v. United States*, 272 F. Supp. 55, 56 (W.D. Mo. 1967).

57. See, e.g., *Ponzi v. Fessenden*, 258 U.S. 254, 261 (1922); *Robb v. Connolly*, 111 U.S. 624, 630 (1884).

58. The criticism of *Tarble* is generally applicable to the Supreme Court's holding in *McClung v. Silliman*, 19 U.S. (6 Wheat.) 598 (1821) (state courts may not direct the writ of mandamus to a federal official).

59. 80 U.S. at 407.

60. *Houston v. Moore*, 18 U.S. (5 Wheat.) 1 (1820). See also *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 508 n.5 (1962); *Irvin v. Dowd*, 359 U.S. 394, 404 (1959); *United States v. Bank of New York*, 296 U.S. 463, 479 (1936); *Galveston, H & S.A. Ry. v. Wallace*, 223 U.S. 481, 490-91 (1912); *Robb v. Connolly*, 111 U.S. 624, 637 (1884).

61. Act of March 3, 1875, ch. 137, 18 Stat. 470. See C. WRIGHT, *LAW OF FEDERAL COURTS* § 1 (4th ed. 1983).

as one commentator observed, "[t]he very statute that gives the Supreme Court appellate jurisdiction over state courts assumes . . . that state courts have the power to decide federal questions."⁶² The United States Constitution also supports the theory that state courts have jurisdiction over federal questions in the very language of the supremacy clause which directs *state* court judges to hold federal law supreme when that law conflicts with state law.⁶³ In view of this constitutional language, the enactments of Congress, and early Supreme Court decisions, commentators have found cases such as *Tarble* puzzling at best.⁶⁴

Second, *Tarble* has been criticized because the Court did not make clear if the basis for the decision was constitutional or implication from congressional inaction.⁶⁵ This criticism need not be discussed in depth because, in either case, Congress would have the power to reverse *Tarble*. Thus, if statutorily based, *Tarble* is "subject to change through explicit congressional action."⁶⁶ Even if it is a constitutional mandate, the Supreme Court affirmed elsewhere the authority of the United States to relinquish voluntarily a prisoner within its custody.⁶⁷ Inferentially, Congress could grant the states the authority to issue writs of habeas corpus to federal officials, thereby permitting a voluntary relinquishment of the detainee.

B. *Mandamus*

Federal courts have also denied state courts the power to control federal officials through the use of the writ of mandamus. The seminal case is *McClung v. Silliman*,⁶⁸ decided by the Supreme Court in 1821. In *McClung*, the plaintiff requested that

62. Arnold, *supra* note 54, at 1399.

63. *Id.* at 1401-02.

64. See, e.g., *id.* at 1405; Note, *Limitations on State Judicial Interference with Federal Activities*, 51 COLUM. L. REV. 84, 91, 97 (1951). But see M. REDISH, *supra* note 4, at 119 (discussing the impact of the Civil War, the fourteenth amendment, and civil rights legislation as evidence of the change in federal-state authority, with an intentional move towards stronger federal authority); *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) (stating that the "legislative history [of 42 U.S.C. § 1983—federal civil rights statute] makes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights").

65. M. REDISH, *supra* note 4, at 120-24.

66. *Id.* at 122 n.85.

67. *Ponzi v. Fessenden*, 258 U.S. 254, 261-63 (1922).

68. 19 U.S. (6 Wheat.) 598 (1821).

the state court issue a writ of mandamus to the federal land registrar to force him to issue the plaintiff a deed to a tract of land. The state court found that it had jurisdiction over the registrar but that the plaintiff was not the owner of the land.⁶⁹ The United States Supreme Court affirmed the result, but held that the state court lacked jurisdiction to issue the writ. The land registrar's "conduct [could] only be controlled by the power that created him."⁷⁰ State and federal courts have almost uniformly followed *McClung* in denying state courts the power to issue the writ of mandamus.⁷¹ Despite some exceptions to the rule,⁷² there is general agreement that *McClung* has retained its precedential value.⁷³

One factor considered by the court was that at the time that *McClung* was decided, Congress had not granted to the district courts the power to issue the writ of mandamus.⁷⁴ Congress vested federal district courts with original mandamus jurisdiction in 1962.⁷⁵ That grant has raised questions concerning *McClung*'s continuing vitality. *Perez v. Riddlehoover*⁷⁶ involved a suit brought by a district attorney in Louisiana state court against federal voting examiners. The district attorney sought to prevent the voting examiners from registering parish residents who allegedly did not meet the requirements of the state voting law. When the state court issued a temporary restraining order that blocked registration, the voting examiners removed the case to federal district court where the court characterized the action as "not a mandamus action, and . . . not subject to the infirmi-

69. *Id.*

70. *Id.* at 605.

71. See, e.g., *Wasservogel v. Meyerowitz*, 300 N.Y. 125, 89 N.E.2d 712, 716-17 (1949); *Armand Schmoll, Inc. v. Federal Reserve Bank*, 286 N.Y. 503, 37 N.E.2d 225, 229-230 (1941), *cert. denied*, 315 U.S. 818 (1942).

72. "One unexplained exception to [the *McClung*] line of cases . . . is *Northern Pac. Ry. v. North Dakota ex rel. Langer*, 250 U.S. 135, 151-52 (1919)." M. REDISH, *supra* note 4, at 116 n.47.

73. See, e.g., M. REDISH, *supra* note 4, at 116.

74. *McIntire v. Wood*, 11 U.S. (7 Cranch) 504 (1813), established the doctrine that the federal courts could not hear original suits for mandamus but could only issue such writs on ancillary motions. In *Kendall v. United States ex. rel. Stokes*, 37 U.S. (12 Pet.) 524, 617 (1838), this doctrine was changed to give the Circuit Court for the District of Columbia original mandamus jurisdiction, but state court jurisdiction was not addressed. See *Arnold*, *supra* note 54, at 1392.

75. Act of Oct. 5, 1962, Pub. L. No. 87-748, § 1(a), 76 Stat. 744 (codified at 28 U.S.C. § 1361 (1976)).

76. 247 F. Supp. 65 (E.D. La. 1965).

ties of such an action," but rather as an action "to enjoin the federal examiners from registering persons who do not meet the requirements of state laws concerned with voter qualifications."⁷⁷ The court then discussed in a note the power of state courts to issue writs of mandamus to federal officials and observed that *McClung* was at least partially based on the reasoning that state courts could not exercise power over federal officials when Congress had not given such power to the federal courts. According to the court, "[t]o the extent that *McClung* rests on the [rationale] that the federal courts had not been given mandamus jurisdiction, it may now be questionable in the light of [the federal law] granting such jurisdiction."⁷⁸

If the district court's observation is correct that *McClung* turned on the absence of congressional action, but that a different result would be required after Congress granted mandamus jurisdiction to the district courts, two conclusions follow. First, *Tarble* and *McClung* are not required by the Constitution because a different result would follow from congressional action. Second, the district court in *Perez* suggested that it might infer from the 1962 act empowering federal district courts to issue the writ of mandamus a similar power to be exercised by state courts. That reasoning would make *McClung* inconsistent with *Tarble* because in *Tarble*, if understood as a congressional intent case, the Supreme Court was unwilling to empower state courts absent express congressional action. There it did not follow that because a federal district court could have issued the writ of habeas corpus a state court could do so as well. In *Perez* the court expressed a willingness to infer state court power from a statute silent on the question. The tension between plausible readings of *Tarble* and *McClung* is further exacerbated when one turns to other related precedents.

C. Other Precedent

The Supreme Court has decided at least two other cases in which state courts have attempted to exercise jurisdiction over federal officials. In *Boske v. Comingore*,⁷⁹ the state court held a United States Collector of Internal Revenue in contempt for re-

77. *Id.* at 69.

78. *Id.* at 69 n.8.

79. 177 U.S. 459 (1900).

fusing to produce copies of official reports. The collector's refusal was based on a Treasury Department regulation which directed that such reports were to be used for revenue collection purpose only.⁸⁰ The Supreme Court affirmed the district court's grant of the writ of habeas corpus and held that the detention violated the Constitution and the laws of the United States.⁸¹

In *Tennessee v. Davis*,⁸² the state attempted to prosecute a deputy collector for the Internal Revenue Service who allegedly acted in self-defense while engaged in his official duty of seizing an illicit distillery. The Supreme Court upheld the constitutionality of the federal statute permitting federal officials to remove a criminal or civil proceeding to federal courts.⁸³ The Court based its decision both on the practical difficulty created if federal officials can be interfered with by state authorities and on the principles of federalism:

If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court for an alleged offense against the law of the State, yet warranted by the Federal authority they possess, and if the general government is powerless to interfere at once for their protection,—if their protection must be left to the action of the State court,—the operations of the general government may at any time be arrested at the will of one of its members

We do not think such an element of weakness is to be found in the Constitution. The United States is a government with authority extending over the whole territory of the Union, acting upon the States and upon the people of the States. While it is limited in the number of its powers, so far as its sovereignty extends it is supreme. No State government can exclude it from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will, or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it.⁸⁴

Neither *Boske* nor *Davis*, however, should be read as a broad denial of state court power over federal officials. In *Boske*,

80. *Id.* at 460.

81. *Id.* at 470; see also *In re Turner*, 119 F. 231 (S.D. Iowa 1902).

82. 100 U.S. 257 (1879).

83. 28 U.S.C. § 1442(a) (1976).

84. 100 U.S. at 263; see also *Ohio v. Thomas*, 173 U.S. 276 (1899) (state has no constitutional power to interfere with internal administration of a federal institution located within a state's territory).

there was a direct conflict between federal and state policies, the kind of conflict within the preemption doctrine.⁸⁵ State court action directly impaired the functioning of the federal government. *Davis* merely upheld removal to federal court. By implication, therefore, the state court had jurisdiction over the case because removal jurisdiction is derivative.⁸⁶ Absent invocation of removal, the state court had the power to hear the case.

D. Injunctions

The Supreme Court has not decided the question whether state courts may enjoin federal officials.⁸⁷ Among lower courts, the general trend is to deny that authority, but there is precedent to the contrary. *Pennsylvania Turnpike Commission v. McGinnes*⁸⁸ is illustrative of the general trend. In *McGinnes*, the Pennsylvania Turnpike Commission (PTC), a state agency, filed suit in federal court to enjoin the Internal Revenue Service from paying a tax refund to a taxpayer who had allegedly obtained money to pay federal income taxes by fraud on the PTC. After the suit was dismissed for want of jurisdiction, it was refiled in state court from which it was removed to federal court.⁸⁹ With citations to *Tarble* and *McClung*, the district court again dismissed for want of jurisdiction because a state court would have had no power to issue the injunction.⁹⁰ The court also cited *Owl-ett*, observing that limitations on the power of state legislatures paralleled those imposed on state courts.⁹¹

The result in *McGinnes* seems to follow logically from *Tarble*. As one scholar has observed, any "distinction between injunction and habeas corpus is difficult to understand."⁹² However, the case is not without irony: the theory of parity applies

85. See J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 2, at 267.

86. See, e.g., *Lambert Run Coal Co. v. Baltimore & O.R.R.*, 258 U.S. 377, 382 (1922).

87. M. REDISH, *supra* note 4, at 117-18.

88. 179 F. Supp. 578 (E.D. Pa. 1959), *aff'd*, 278 F.2d 330 (3d Cir.) (per curiam), *cert. denied*, 364 U.S. 820 (1960). See also cases cited *supra* note 40.

89. 179 F. Supp. at 579-80.

90. State law was relevant because federal court jurisdiction on removal is derivative; thus, if the state court was without jurisdiction the federal court derives none. See, e.g., *Lambert Run Coal Co. v. Baltimore & O.R.R. Co.*, 258 U.S. 377, 382 (1922); C. WRIGHT, *supra* note 61, § 38, at 150.

91. 179 F. Supp. at 582.

92. M. REDISH, *supra* note 4, at 118.

when a case is removed to federal court; the court derives only that jurisdiction which the state court had prior to removal. But parity would not extend to the state court hearing the case in the first instance any authority that a federal court might possess to enjoin a federal official.⁹³

As indicated, not all federal courts have followed the trend.⁹⁴ For example, in *Lewis Publishing Co. v. Wyman*,⁹⁵ suit was brought in state court to enjoin enforcement of an order of the Postmaster General. After removal to federal court, the defendants moved to dismiss because the state court lacked jurisdiction to enjoin a postal official. The court rejected that contention, relying on the premise of fungibility—that absent a congressional decision to make jurisdiction exclusive, it is concurrent.⁹⁶ The court also was unimpressed by the argument that such suits would interfere with operation of government:

It was also contended on behalf of the defense that, in view of the fact that actions of this nature are an interference with the proper discharge of the duties imposed upon one of the executive departments of the national government in pursuance of the Constitution, the wheels of the government may be stopped by improper injunctions granted by state courts all over the country, if permitted. It would be a sufficient answer to this contention that there is no reason to presume that the courts of the states will pervert the laws of the nation any more than would the national courts, and that Congress is of that opinion is conclusively evidenced by the fact that it has not seen proper to deprive the state courts of that jurisdiction by conferring exclusive jurisdiction on the courts of its own creation in cases of this nature, or even cases arising under the revenue laws. The reports of the Supreme Court of the United States are full of cases which were originally instituted against collectors of customs and internal revenue in the state courts and removed to the national courts, and in none of them has that high tribunal ever held that the state court in which the

93. See, e.g., *Monmouth Legal Services Org. v. Carlucci*, 330 F. Supp. 985 (D.N.J. 1971); *Crowther v. Seaborg*, 312 F. Supp. 1205 (D. Colo. 1970); Administrative Procedure Act, 5 U.S.C. § 702 (1982) (requiring federal judicial review of actions challenging the conduct of federal officers and seeking relief other than monetary damages).

94. See, e.g., *McNally v. Jackson*, 7 F.2d 373 (E.D. La. 1925); *Underwood v. Dismukes*, 266 F. 559 (D.R.I. 1920); *City of Stanfield v. Umatilla*, 192 F. 596 (C.C.D. Or. 1911).

95. 152 F. 200 (C.C.E.D. Mo. 1907).

96. *Id.* at 203-04.

suit was originally instituted was without jurisdiction.⁹⁷

Therefore, without reference to *Tarble* and *McClung*, the circuit court in *Wyman* affirmed the state court's power to enjoin postal officials.

As will be argued below,⁹⁸ in addition to being justifiable based on the idea of fungibility, *Wyman* is consistent with current views of immunities. Broad immunities are contrary to just results. *Wyman* rejects a broad presumption that state courts will pervert federal law and that therefore federal officials must always be immune from state court injunctions. By implication, *Wyman* may be read to suggest that a federal official could not raise unwarranted interference with the operation of government as a defense to the issuance of the state court injunction.

E. Recognition of State Court Power

Apart from well-established cases involving habeas corpus and mandamus and an uncertain trend involving injunctive proceedings, there are areas in which state court authority over federal officials is clear.⁹⁹ Since *Teal v. Felton*¹⁰⁰ was decided in 1852, it has been established that state courts can award damages to plaintiffs injured by federal officials.¹⁰¹ In *Teal*, the Supreme Court affirmed a state court judgment in an action for trover in which the plaintiff was awarded nominal damages caused by a postmaster's refusal to deliver a newspaper to the plaintiff. Cases following *Teal* have distinguished *Tarble* and *McClung* on the basis of their respective potentials for interference with the functioning of the federal government.¹⁰²

This rationale breaks down when Supreme Court cases on replevin¹⁰³ and ejectment¹⁰⁴ are examined. The power of state

97. *Id.* at 205.

98. See *infra* text accompanying notes 111-26.

99. See Arnold, *supra* note 54, at 1394.

100. 53 U.S. (12 How.) 284 (1852).

101. See, e.g., *Leroux v. Hudson*, 109 U.S. 468 (1883); *Sharpe v. Doyle*, 102 U.S. 686, 690 (1881); *Buck v. Colbath*, 70 U.S. (3 Wall.) 334 (1866); *Benchley v. Gilbert*, 3 F. Cas. 158 (C.C.N.D.N.Y. 1871); *Ex parte Jenkins*, 13 F. Cas. 445, 448-50 (C.C.E.D. Pa. 1853); *Williams v. McDaniel*, 80 Ga. App. 614, 56 S.E.2d 926 (1949).

102. Professor Redish observes, however, that the impact of state criminal cases and damage actions against federal officials "may be very real." M. REDISH, *supra* note 4, at 118 n.65.

103. *Slocum v. Mayberry*, 15 U.S. (2 Wheat.) 1 (1817).

courts to grant such relief has been upheld even though these are "actions in which the judgment may differ only in form from an injunction."¹⁰⁵

State courts may assert jurisdiction over federal officials in other contexts. State courts have jurisdiction in criminal actions against federal officers.¹⁰⁶ The state's jurisdiction is circumscribed both by the defendant's right to remove the case to a federal court¹⁰⁷ and by the power of federal courts to secure the prisoner's release by the writ of habeas corpus.¹⁰⁸ State courts also have jurisdiction over national banks and other federal corporations.¹⁰⁹ As one commentator has observed, "Congress . . . has commonly assumed that federal corporations and agencies will be suable in state courts, once the bar of sovereign immunity—which, unlike the doctrine presently being examined, prevents suit in any court, state or federal—is removed by statute."¹¹⁰

V. CRITICISM OF LIMITATIONS ON STATE COURTS' POWER

The law governing state court power to control the actions of federal officials is "in confusion."¹¹¹ The lines drawn by the Supreme Court—such as those drawn between mandamus and replevin or governmental agencies generally and federal banks—are inconsistent. There is considerable dispute over where such lines ought to be drawn. For example, one commentator observes that "the matter cannot be resolved purely by reference to authority. An appeal must be made to first principles. Only by understanding the place of the state courts in the fed-

104. *Stanley v. Schwalby*, 147 U.S. 508 (1893).

105. Arnold, *supra* note 54, at 1394-95.

106. See, e.g., *United States ex rel. Drury v. Lewis*, 200 U.S. 1 (1906).

107. 28 U.S.C. § 1442(a) (1976).

108. *In re Neagle*, 135 U.S. 1 (1889). After *United States ex rel. Drury v. Lewis*, 200 U.S. 1 (1906), it is clear that the district court has discretion in its use of the writ: "We have repeatedly held that the acts of Congress in relation to *habeas corpus* do not imperatively require the Circuit Courts to wrest petitioners from the custody of state officers in advance of trial in the state courts, and that those courts may decline to discharge in the proper exercise of discretion." *Id.* at 8.

109. *First Nat'l Bank v. Missouri ex rel. Barrett*, 263 U.S. 640 (1924).

110. Arnold, *supra* note 54, at 1396. The relevant federal statute allowing national banks to be sued "in any court of law and equity," 12 U.S.C. § 24 (1982), has been construed to include state courts. *Mercantile, Nat'l Bank v. Langdeau*, 371 U.S. 555 (1963).

111. Arnold, *supra* note 54, at 1397.

eral system can the question of those courts' power over federal officials be properly settled."¹¹² After examining these basic principles, most commentators have concluded that state courts have the power over federal officials.¹¹³ They rely on the concurrent jurisdiction vested in state courts to argue that state courts are fungible with federal courts, and, therefore, should have the same authority to act. Thus, one writer relied on Alexander Hamilton to support the theory of fungibility:

I mean not therefore to contend that the United States, in the course of legislation upon the objects intrusted to their direction, may not commit the decision of causes arising upon a particular regulation to the federal courts solely, if such a measure should be deemed expedient; but I hold that the State courts will be divested of no part of their primitive jurisdiction, further than may relate to an appeal; and I am even of opinion that in every case in which they were not expressly excluded by the future acts of the national legislature, they will of course take cognizance of the causes to which those acts may give birth. . . . When in addition to this we consider the State governments and the national governments, as they truly are, in the light of kindred systems, and as parts of ONE WHOLE, the inference seems to be conclusive, that the State courts would have a concurrent jurisdiction in all cases arising under the laws of the Union, where it was not expressly prohibited.¹¹⁴

That writer concludes that

[f]or a state court, accordingly, to order a federal official to act according to federal law, or to obey valid state law that Congress has not displaced, is no usurpation, nor any assertion that state courts are superior to federal courts or federal officials. It is rather an assertion of the supremacy of law, and especially of federal law.¹¹⁵

In other words, federal law, not federal courts, is supreme.

In supporting this view of fungibility, one critic of the *Tarble-McClung* line of cases dismisses the interference with a government rationale: "[W]hy is not the doctrine of sovereign im-

112. *Id.*

113. *Id.* at 1404-06; cf. Bishop, *The Jurisdiction of State and Federal Courts over Federal Officers*, 9 COLUM. L. REV. 397, 417-18 (1909); Note, *supra* note 64, at 91.

114. Arnold, *supra* note 54, at 1398 (quoting THE FEDERALIST No. 82 (A. Hamilton)).

115. *Id.* at 1401.

munity, which bars relief against the Government and, in circumstances in which the relief prayed will seriously interfere with governmental functions, against its officers, a sufficient protection?"¹¹⁶ Sovereign immunity might also protect officials whose duties are targets of writs of habeas corpus or writs of mandamus. In addition, goes the argument, federal officials may seek removal to federal court in many cases in which they are haled into state court.¹¹⁷ Those officials may also seek expeditious habeas corpus relief, even pretrial, if unlawfully incarcerated.¹¹⁸ Further, rather than a blanket prohibition against state court action, Congress can grant exclusive jurisdiction over specific areas in which state interference is real.¹¹⁹

The foregoing articles suggest that the *Tarble-McClung* view of dual sovereignty is wrong because it does not accord sufficient respect to the state system, and that the interference rationale is factually inaccurate. Those criticisms apply with equal force to state legislatures and to state courts. But additional arguments can be made for allowing state legislatures the subpoena power over federal officials.

VI. THE VIEW FROM THE LEGISLATIVE CHAMBER

At the inception of this discussion, it was posited that there are and will be increasingly wide areas of mutual state and federal legislative concern. Federal officials will often be in possession of facts necessary for informed state legislative decisions. There is no guarantee that federal officials will voluntarily comply with a request to appear before the state body.

Although in dictum courts have treated as coterminous the immunity of federal officials from appearing before state legislatures and the immunity of federal officials from appearing before state courts,¹²⁰ that conclusion does not necessarily follow. The theoretical criticism of *Tarble* and *McClung* undoubtedly applies with similar force to the legislatures in a federal system.

116. *Id.* at 1393.

117. *See, e.g.,* M. REDISH, *supra* note 4, at 118 n.65 (citing 28 U.S.C. § 1442(a) (1976)).

118. Arnold, *supra* note 54, at 1402.

119. *Id.* *See also* Note, *supra* note 64, at 94.

120. *See, e.g.,* United States v. McLeod, 385 F.2d 734, 751-52 (5th Cir. 1967); Pennsylvania Turnpike Comm'n v. McGinnes, 179 F. Supp. 578, 580, 582 (E.D. Pa. 1959); United States v. Owlett, 15 F. Supp. 736, 741 (M.D. Pa. 1936).

But the pragmatic argument based on interference with the operation of government is even weaker when one considers the burden of appearing before a state legislature. Extending subpoena power to state courts does not limit the number of summoning parties to the number of state courts, but leaves federal officials open to being summoned by myriad private litigants.¹²¹ There are far fewer occasions for state legislatures to summon federal officials than there would be for state courts to do so. In addition, if a state legislature were granted the right to subpoena federal officials, the federal government and its officials would not be unprotected from abuse. If a dispute arose as to specific questions, a witness could seek an injunction from a federal court or, if incarcerated for contempt, could petition a federal court for a writ of habeas corpus.

The law governing immunities generally has undergone change in recent years. The trend is clearly away from blanket immunities because they are not favored in the law.¹²² This would seem to be especially true when the federal government seeks equitable relief to bar completely the testimony of its employees. If a legislative inquiry is proper and is not intended to harass and does not present an unusual burden on the government, there would seem to be no reason for equity to intervene. Further, despite broad dicta to the contrary, the case law does not support the existence of a complete immunity when a legislature seeks compliance.

As indicated above, case law on the legislature's power to subpoena federal officials is scant. *Owlett* contains broad lan-

121. Even if the complete immunity were abrogated, thereby allowing state courts to compel attendance of federal officials, it is doubtful that the federal government would grind to a halt. As indicated, *supra* note 93, the Administrative Procedure Act allows federal courts to enjoin federal officials, apparently without undue hardship. State officials may be haled into federal courts, again apparently without paralysis to state government. See, e.g., *Monnell v. Department of Social Servs.*, 436 U.S. 658 (1978) (local governing body subject to suit under federal civil rights act); *Monroe v. Pape*, 365 U.S. 167 (1961) (state police officer subject to suit for violation of fourth amendment of United States Constitution); *Ex parte Young*, 209 U.S. 123 (1908) (suit to enjoin state officials from enforcing unconstitutional state statute).

122. See W. PROSSER, J. WADE & V. SCHWARTZ, *TORTS: CASES AND MATERIALS* 643-677 (7th ed. 1982); C. WRIGHT, *supra* note 61, at 82. Cf. *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719 (1980) (Virginia Supreme Court not immune from suit when exercising its enforcement powers under the state bar code); *Butz v. Economou*, 438 U.S. 478 (1978) (only qualified immunity for federal officials from civil rights actions).

guage that "[t]he complete immunity of a federal agency from state interference is well established."¹²³ It has been cited for that proposition.¹²⁴ But the actual holdings of *Owlett* and the related *McCleod* case are far narrower than the cited language suggests.

In *Owlett*, the district court specifically found that the legislature had no jurisdiction over the area of its proposed inquiry.¹²⁵ A more narrowly written opinion, fitted to the actual holding of *Owlett*, would have concluded that federal officials are immune if federal law has preempted the field and there is no room left for state legislation. Or, if the court's concern in *Owlett* were actual harassment, as it was in *McCleod*, the court could properly have granted equitable relief on that basis.¹²⁶

If, as argued above, there is no real basis for denying state legislatures the power to subpoena federal officials, the only remaining consideration is how a state legislature ought to proceed. State legislatures already have the power to issue subpoenas and conduct investigations,¹²⁷ making state legislation unnecessary. One possible procedure would be to allow the legislature to subpoena a federal official with information relevant to an area appropriate for state legislation. If the official refused to comply, the legislature could hold her in contempt, incarcerate her, and challenge the validity of the complete immunity when she petitions a federal court for a writ of habeas corpus.¹²⁸ Although this writer believes that the Supreme Court would eventually narrow the immunity, for example, to cases involving actual harassment or inquiries beyond the legislature's jurisdiction, there is no guarantee that the Supreme Court would resolve that dispute or that, if it did so, the case would be decided expeditiously. Therefore, another method of establishing a legislature's subpoena power would be preferable.

123. *United States v. Owlett*, 15 F. Supp. 736, 741 (M.D. Pa. 1936).

124. *United States v. McLeod*, 385 F.2d 734, 752 (5th Cir. 1967).

125. 15 F. Supp. at 740.

126. See, e.g., *Steffel v. Thompson*, 415 U.S. 452 (1974) (federal declaratory relief is available to a federal plaintiff who demonstrates a genuine threat of enforcement of a disputed state criminal statute).

127. See *supra* notes 13-20 and accompanying text.

128. The question might reach the federal court with less friction, e.g., if the official were to seek an injunction as in *Owlett*, or if one of the parties were to seek a declaratory judgment in federal court under 28 U.S.C. § 2201 (1976 & Supp. V 1981).

As indicated, even in light of *Tarble*, the Supreme Court has upheld the power of the Attorney General to consent to the release of a prisoner to state officials.¹²⁹ That is, the United States may consent to appear through its officials. This writer recommends that Congress should enact legislation to establish the right of a state legislature to subpoena federal officials and to issue subpoenas *duces tecum* for relevant documents, subject to limited immunity. Sample legislation follows:

(A) When an officer or an employee of an executive agency, department, or office of the United States is subpoenaed to testify at a proceeding before a state legislative body, or any committee, or any subcommittee of such a legislative body, the officer or employee shall comply with the subpoena. Federal officers or employees shall also provide documents, books, recordings, papers, and other materials ordered by state legislative bodies, committees, or subcommittees. If the official refuses to comply with an order to testify or produce other materials and is not exempted from compliance by the provisions of section (B) of this statute, that official is subject to the sanctions authorized by the state law for noncompliance with its subpoenas.

(B) Officers and employees of agencies, departments, and offices of the United States may refuse to comply with subpoenas or subpoenas *duces tecum* issued by state legislative bodies, committees, or subcommittees only if the official makes an adequate showing before a federal district court that

- (1) the information sought by the state legislature or legislative committee or subcommittee does not relate to a valid purpose of the state legislature or to a matter within the state's power to legislate; or
- (2) the purpose or effect of the order is to impede, obstruct, or burden unduly the operation of an agency, department, or office of the United States or the performance of an officer's duties as authorized under United States law.

(C) If the official makes an adequate showing under subsection (B) (1) or (2), the federal district court shall enjoin the state legislative body, committee, or subcommittee either from ordering the appearance of the official before the state legislature or committee or from requiring the official to respond to specific questions or requests for documents. If the official has

129. *Ponzi v. Fessenden*, 258 U.S. 254 (1922).

been incarcerated for contempt of the state legislative body, committee, or subcommittee, and if the official makes an adequate showing under subsection (B) (1) or (2), the federal district court shall order the state officer in whose custody the federal official has been placed to release the federal official.¹³⁰

VII. CONCLUSIONS

The sample legislation reflects the several arguments made in this article. It rejects the broad dicta in *Owlett* that federal officials have a complete immunity from appearing before the state legislature. The Supreme Court has never endorsed that view. The dicta in *Owlett* was far broader than the facts of the case which involved an instance of obvious abuse by a state legislature hostile to federal law. Further, a complete immunity is bad policy in light of the legitimate needs of state lawmakers.

Section (A) of the sample bill states what this writer believes ought to be the general rule: that federal officials should comply with state process. Further, section (A) provides specifically that the legislature may use its own sanctions to enforce compliance. Although not specifically stated, an official could raise defenses available to any other witness appearing before the legislature, such as first or fifth amendment objections.

Section (B) provides for defenses available to the federal official in her capacity as a federal official. As discussed above,¹³¹ cases like *Owlett* and *McCleod* reflect valid concerns that state agencies may act to impede proper exercise of federal authority or to unduly burden the operation of the federal government. Rather than require the federal official to raise these questions defensively in the state compliance proceeding, section (B) allows the federal official to act prospectively to prevent abuse.¹³²

130. In drafting this statute, this writer attempted to balance the need of the legislature with the interest of comity between federal and state sovereigns. There is no room within "Our Federalism" for frequent coercive intrusions into the sphere of the other sovereign. Cf. *Hicks v. Miranda*, 422 U.S. 332 (1975) (federal courts should not interfere with pending state court prosecutions); *Younger v. Harris*, 401 U.S. 37 (1971) (federal courts will not enjoin state criminal prosecutions unless there are extraordinary circumstances); *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941); 28 U.S.C. § 2283 (1976) (limitation on federal court jurisdiction to enjoin state proceedings).

131. See *supra* text accompanying notes 21-34, 123-26.

132. Because the power of the federal court to enjoin the state proceeding would be express, it would be a clear exception to the general prohibition against federal injunctions against state court proceedings under 28 U.S.C. § 2283.

It also guarantees a forum—the federal district court—which is more likely to be protective of the federal rights involved than would be the legislature or state body seeking compliance with its own process. Thus, the sample legislation attempts to balance competing considerations of federal and state sovereignty, allocating to each its rightful authority.